Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for	)	CC Docket No. 01-321
Interstate Special Access Services	)	

REPLY COMMENTS OF THE VERIZON TELEPHONE COMPANIES

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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REPLY COMMENTS

The Verizon Telephone Companies ("Verizon") respectfully reply to the comments recommending adoption of special access performance measures and enforcement mechanisms.[1] As shown in Verizon's opening comments and further discussed below, reporting requirements are unnecessary in light of vibrant competition in the special access marketplace, and the proposed enforcement mechanisms are both unlawful and antithetical to sound pubic policy. The CLECs' proposals, moreover, seek to impose draconian burdens on the ILECs while exempting themselves. Doing so would grossly distort competition and harm consumers. Any performance measures and enforcement mechanisms must apply evenly to all competitors.

I. INTRODUCTION AND SUMMARY

AT&T, WorldCom, and their supporters (collectively, the "CLECs") would have the Commission believe that competition is too important to be left to the marketplace. What is needed, they contend, is a supposedly "concise set of metrics"[2] – which in reality would require Verizon to report on more than 300,000 measures every month (3.6 million measures per year) –

[1] The Verizon Telephone Companies are listed in Attachment A to Verizon's opening comments.

[2] Letter from Joint Competitive Industry Group to Chairman Michael K. Powell, dated Jan. 22, 2002, at 1 ("Joint Commenters Letter").

backed up by an enforcement mechanism involving (among other things) treble damage liability,[3] forfeitures set at the statutory maximum,[4] revocation of Title III licenses and Section 271 authority,[5] and various forms of audits tied to still further fines.[6] These draconian penalties would be "automatic," with only "catastrophic events" providing a possible defense,[7] and would apply only to the ILECs, notwithstanding the substantial level of competition in the provision of special access services.

The CLECs' proposals bear no relation to marketplace reality and are irreconcilable with the requirements of the Act. There is no market failure and thus no need for regulatory intervention.[8]

Far from being the only game in town, the ILECs face extensive and expanding special access competition. While our opponents point to ILEC market share as evidence of ILEC market power, they are wrong on three counts. First, CLECs already have a significant share of

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[3] *See* Comments of WorldCom, Inc., CC Docket No. 01-321, at 49-50, (filed January 22, 2002) ("WorldCom").

[4] *See e.g.*, Comments of Association of Communications Enterprises, CC Docket No. 01-321, at 8 (filed January 22, 2002) ("ASCENT"); Comments of Focal Communications Corporation, Pac-West Telecom, Inc. and US LEC Corp., CC Docket 01-321, at 27-29 (filed January 22, 2002) ("Focal").

[5] WorldCom at 52-55.

[6] *See, e.g.*, WorldCom at 51-52, Comments of Time Warner Telecommunications and XO, CC Docket 01-321, at 27, (filed January 22, 2002) ("TWT/XO"); Comments of ALTS, CC Docket 01-321, at 12 (filed January 22, 2002) ("ALTS"); Focal at 36.

[7] *See* WorldCom at 48; Focal at 33 n.54.

[8] *See Remarks of Commissioner Michael K. Powell Before The Progress & Freedom Foundation, "The Great Digital Broadband Migration,"* (Dec. 8, 2000) ("we must foster competitive markets, unencumbered by intrusions and distortions from inapt regulations. And, most importantly, we have to be careful to see speculative fear and uncertainty in this innovation-driven space for what it is and not prematurely conclude we are seeing a market failure that justifies regulatory intervention.).

the market (more than one-third).[9] Second, ILEC market share has declined precipitously in locations accounting for the majority of special access demand. Third, market share is not a reliable indicator of market power in any event. For a number of good reasons, our competitors may *choose* to use ILEC facilities to reach "off-net" locations. They are not, however, *compelled* to do so for buildings and wire centers serving the most significant sources of special access demand. And, even on routes where the ILEC currently is the sole provider of special access, there are no insurmountable obstacles to deployment of competitive facilities.

Far from being insensitive to our customers or content to provide shoddy service, Verizon voluntarily offers detailed performance reports, communicates constantly with our customers, and has committed large sums of money to enhance ordering and provisioning processes and expand capacity. Our special access service quality is reasonable, and it will continue to improve over time because of competitive pressure and the demands of a sophisticated customer base.

Far from discriminating against carrier customers, Verizon installs and maintains service for all of its customers on a nondiscriminatory basis. While ordering procedures differ because of the distinct demands of carriers and end users – and those procedural differences may create the misleading appearance that one group is receiving better service – the reality is that Verizon's performance is strictly neutral. Nor, contrary to claims by WorldCom and others, do Verizon and other BOCs have an increased incentive to discriminate as they gain interLATA authority.[10] Because the market for enterprise communications services is nationwide (as

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[9] *Joint Petition of BellSouth Corporation and BellSouth Telecommunications, Inc., SBC Communications, Inc., and The Verizon Telephone Companies*, CC Docket 96-98 (filed April 5, 2001), Attachment B: *Competition For Special Access Service,High Capacity Loops, and Interoffice Transport*, at 5 ("*Special Access Fact Report*").

[10] *See* WorldCom at 6-9; Comments of AT&T, CC Docket 01-321, at 6-9 (filed January 22, 2002) ("AT&T").

WorldCom admits), doing so would gain nothing while exposing the BOC to substantial potential liability.

Even if there were a need for regulation of ILEC special access performance, which there is not, the CLECs' proposed reporting requirements and enforcement mechanisms do not merit serious consideration. The Joint Competitive Industry Group ("Joint Commenters") metrics are duplicative, overly disaggregated, uninformative, misleading, and engineered to trigger the greatest possible level of penalties. The CLECs' proposed enforcement mechanisms are inconsistent with Sections 205, 208 and 503 of the Act, would trample on the ILECs' due process rights, and would produce unconscionably excessive damages and forfeitures that would deter facilities-based competition.

The Commission should decline to adopt any special access performance metrics or enforcement mechanisms. If it nonetheless decides to do so, it must apply the new regulatory program evenly to all facilities-based competitors in order to avoid distorting competition. It is easy for our competitors to advocate draconian new regulation from which they would exempt themselves. Perhaps their requests would be more realistic (and pay more respect to the Act's requirements and limitations) if they, too, were subject to any performance plan that ultimately is adopted. There is, after all, no rational basis for excluding the CLECs from such a plan. If performance measures and penalties are needed for the ILECs (and they are not), then they are equally necessary for AT&T, WorldCom, and other CLECs, who are just as able to bear the costs and (assuming any carrier is so inclined) have at least as great an incentive to discriminate in favor of their own end users and affiliates. Perpetuating disparate regulation is harmful enough; expanding it is indefensible.

II. COMPETITION IN THE SPECIAL ACCESS MARKETPLACE OBVIATES THE NEED FOR ADDITIONAL REGULATION.

The CLECs would have the Commission believe that the ILECs enjoy a virtual monopoly in the provision of special access services. They claim that, although they strive to use competitive facilities wherever they are available, they still obtain a large amount of special access from the ILECs. They deny the relevance of the Commission's *Pricing Flexibility Order* to this proceeding, asserting that the ILECs are still "dominant" providers of special access. They suggest that the ILECs' market power is evidenced by increases in certain special access rates following the grant of pricing flexibility. And, they warn that the BOCs' incentive to discriminate in providing special access services will increase as they gain in-region, interLATA authority. These arguments do not withstand scrutiny; in reality, the special access marketplace is vigorously competitive.

A. The Vast Majority of Special Access Demand Is or Can be Supplied by Competitive Sources

In our opening comments, we explained that IXCs, CAPs, CLECs, and end users have competed successfully in the special access market for almost twenty years. Competitive special access providers earned 57 percent as much as was earned by the RBOCs in the year 2000, for a market share of 36 percent. Almost 350 entities provide competitive access service, and these companies have deployed at least 200,000 route miles of local fiber, with multiple local fiber networks present in virtually all of the top 150 MSAs. Facilities-based collocation is so prevalent that 80 percent of BOC special access revenue qualifies for Phase I pricing flexibility and nearly two-thirds qualifies for Phase II relief.[11]

[11] Verizon at 4-6.

Our opponents unsuccessfully attempt to paint a far darker picture of competition in this market. Several commenters, for example, point to a statement by the New York Public Service Commission that Verizon remains dominant in LATA 132.[12] That statement, however, cannot be squared with the realities of the marketplace.[13] For example, the PSC's determination was based on a simple count of circuits reported by various carriers; under that methodology, a single-line DS-0 counted the same as a very high-capacity OC-48. In general, however, the CLECs' circuits are higher bandwidth than Verizon's, so that they account for a much higher proportion of capacity (and of actual traffic carried) than the raw circuit numbers indicate. Finally, the ILECs' special access market share has been declining steadily for years,[14] and, in any event, "market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities"[15] – which is plainly true of the special access market.[16]

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[12] *See, e.g.*, WorldCom at 10; AT&T at 8-10; TWT/XO at 7-8.

[13] In the New York metropolitan MSA, which includes northern New Jersey, 12 facilities-based competitors have over 275 collocation arrangements in 80 wire centers. These offices account for 72% of Verizon's revenue earned in the MSA for channel terminations from the local serving office to the end user's premises. In addition, these offices account for over 75% of the total interstate special access revenues earned by Verizon in the MSA. And by ranking the wire centers in order of revenue earned, 20% of the offices provide 75% of the revenue in the MSA.

[14] Special Access Fact Report at 4-8.

[15] *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5890 (1991) ("Interexchange Competition Order"); *see also United States v. General Dynamics Corp. et al.*, 415 U.S. 486, at 498 (1974) (market share is an imperfect measure of market power because the analysis must consider access to alternative suppliers); *United States v. Baker Hughes, Inc., Eimco Secoma, S.A., and OY Tampella AB*, 908 F.2d 981, 986 (D.C. Cir. 1990) (market share is "misleading" in a "volatile and shifting" market).

[16] The Commission has found a market to be highly demand-elastic when buyers "have both the incentive and ability to evaluate the full range of market options available to them" and "tend to be more informed and sophisticated purchasers of telecommunications services than other customers ...." *Interexchange Competition Order*, 5887. Supply elasticity does not require that competitors can "serve all, or even most" of an incumbent's business; "[t]he real issue is whether competitors have enough readily available capacity to constrain [the incumbent's] market behavior . . ." *Id.*, 5888. The Commission already has recognized that both of these characteristics are true of the special access market. *See Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9593 (2000) (noting that special access customers are usually large businesses). *WorldCom et al. v. FCC*, 238 F.3d 449, 453, 459 ("WorldCom v. FCC") ("[m]ost users of special

These commenters also offer unsupported statements of their own alleged reliance on ILEC facilities. WorldCom, for example, states that approximately 90 percent of its "off-net" special access circuit needs are provided by ILECs even though its policy is to use its own or competitive facilities wherever available.[17] Even if true, this statement is uninformative, since WorldCom does not reveal what percentage of its overall special access service locations are off-net. Given that company's acquisition over the years of MFS, MCI (including mciMetro), Brooks Fiber, and other CAPs, it seems safe to assume that a large number of its circuits – and an even larger proportion of its special access revenues – are on-net.[18] Indeed, WorldCom already has fiber to some 50,000 office buildings or campuses in more than 100 markets in the United States, and its Chief Technical Officer has boasted that "[a] lot of what we do today is simply extend the capability we may already have in an existing metro market."[19]

Other commenters make even more generalized claims than WorldCom. Sprint for example, says that its long distance unit "relies on" ILECs for 93% of its total special access needs.[20] Notably, Sprint does not assert that it is *compelled* to use ILEC facilities for such a high proportion of its special access needs, and any such claim would be patently unbelievable given

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access services are companies with high call volumes"; the FCC's pricing flexibility rules "reasonably serve as a … predictor of competitive constraints on future LEC behavior").

[17] WorldCom at 9-10.

[18] *See Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18138 (1998) ("the merged entity will be able to expand its operations and enter into new local markets more quickly than either party alone could absent the merger. For example, the Applicants claim that MCI Metro and Brooks Fiber will accelerate local city network deployment in secondary markets by 1-2 years.").

[19] Eric Krapf, "Fiber Access: The Slog Continues; Industry Tent or Event," *Business Communications Review,* Aug. 1, 2001, at 38 (quoting Fred Briggs, WorldCom's Chief Technical Officer).

[20] Comments of Sprint Corporation, CC Docket 01-321, at 4-5, (filed January 22, 2002) ("Sprint"). Comments of AT&T Wireless Services, Inc., CC Docket 01-321, at 7-8, (filed January 22, 2002) ("AWS"). Similarly, AWS contends that 90 percent of its transport costs go to ILECs.

the tremendous build-out of alternative facilities.[21] Rather, Sprint already has conceded that it is reluctant to buy local access facilities from its IXC competitors (AT&T and WorldCom, which own the largest CAPs).[22] And, Sprint often may find that the ILEC's special access services represent the best price/value combination notwithstanding a general corporate policy of using non-ILEC facilities. Finally, a significant portion of Sprint's use of ILEC special access services undoubtedly reflects services provided by its own ILEC; Sprint LD's market presence is greatest in its ILECs' serving areas.[23] There is an important difference between "relying on" ILECs because there is no choice and "relying on" ILECs because they are the preferred option.

Some CLECs take a different tack, focusing on the number of buildings served by CLECs. ALTS, for example makes the irrelevant claim that CLECs have access to only 0.4 percent of "buildings" in New York City.[24] What matters of course (assuming that ALTS is even correct), is how many buildings where tenants demand special access service are served by CLECs – or, even more importantly, what percentage of special access demand is in buildings served by CLECs. On these questions, ALTS is silent. Similarly, Cable & Wireless asserts that CLECs serve only 14,805 out of 700,000 office building nationwide.[25] While at least a more

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[21] In fact, in December 2001, Sprint entered an agreement to lease metropolitan are fiber networks from MFN in 10 major U.S. cities. http:/www.currentanalysis.com/CurrentCompete/companyview/cfm?Vendorid=639&nav=2 (updated Jan. 24, 2002) ("Sprint Analysis").

[22] Comments of Sprint Corporation, CC Docket No. 96-98, at 5-6 (filed April 5, 2001).

[23] Sprint LD enjoys a 40 percent overall market share in its ILEC service areas. Sprint Analysis, at 4. In contrast, Sprint LD's nationwide long distance market share is only 9.8 percent. *Statistics of the Long Distance Telecommunications Industry*, Federal Communications Commission, Common Carrier Bureau. January 2001, pp. 2, 17.

[24] ALTS at 8.

[25] Comments of Cable & Wireless USA, Inc., CC Docket 01-321, at 4 (filed January 22, 2001) ("Cable & Wireless").

relevant universe, this statement is wrong[26] - the actual number of commercial office buildings served by CLECs is at least 175,000[27] - and, in any event, still does not account for the fact that most of these buildings do not house tenants with sufficient demand to justify special access service. For its part, WorldCom contends that, even in wire centers with collocations, only about 13 percent of building can be reached using CLEC facilities.[28] Once again, even assuming WorldCom is correct, the building served by CLECs are likely to represent the substantial majority of special access demand.[29]

More fundamentally, the current deployment of CLEC facilities is not the end of the road; CLECs continue to extend their networks, even in the face of a slow economy. While WorldCom self-servingly suggest that it is "almost never economically viable" to build fiber out to additional buildings,[30] this claim is belied both by the statement of its own Chief Technical Officer and by the SEC filings of various CLECs.[31] Alternative fiber networks already serve or

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[26] As noted above, WorldCom alone has fiber to some 50,000 office buildings and campuses.

[27] *See* Special Access Fact Report at 11; *Reply of BellSouth, SBC, and Verizon,* CC Docket 96-98, (filed June 25, 2001), Attachment A: *Rebuttal Report Regarding Competition For Special Access Service, High-Capacity Loops, and Interoffice Service, High-Capacity Loops, and Interoffice Transport,* at 17-20 ("Rebuttal Fact Report"). Notably, the Smart Buildings Policy Project (a coalition that includes AT&T, WorldCom, Comp Tel, ALTS, and other CLECs) has stated that CLECs already serve buildings housing one-third of the 60 million business access lines in the country. Rebuttal Fact Report at 11. It is reasonable to assume that the CLEC-served buildings account for much more than one-third of the special access lines, since most CLECs rationally focus their marketing efforts and networking investments on larger businesses.

[28] WorldCom at 35.

[29] The special access market is highly concentrated, with about 80 percent of Verizon's special access revenue earned in areas served by 20 percent of its central offices. The level of concentration is likely to be even higher on a building-by-building basis – that is, 20 percent of the buildings served represent far more than 80 percent of the special access revenues earned.

[30] WorldCom at 11-12.

[31] *See, e.g.,* SEC Form 10-Q, Time Warner Telecom., Inc., at 16 (filed November 13, 2001). ("The Company continues to expand its footprint within its existing markets by expanding its network into new buildings."); SEC Form 10-Q, XO Communications, Inc., at 24-26 (filed November 14, 2001) (in the preceding 12 months, the company added almost 14,000 route rules (a 155 percent increase) and expanded from 1761 to 2346 on-net

are within striking distance of buildings housing the vast majority of tenants with special access demand, and each time a CLEC extends its network to reach a new building, it becomes that much easier to go further and connect to additional locations.

Notwithstanding the CLECs' claims, special access competition is more than vibrant enough to discipline the ILEC's behavior. The market demands high quality service, and any vendor that does not perform accordingly will suffer the consequences. Under these conditions, there is no justification for adopting an intrusive new regulatory regime, much less applying it exclusively to one segment of the market.

B. The Grant of Special Access Pricing Flexibility Further Confirms that Competition Is Sufficient To Compel Reasonable Service.

The Commission's pricing flexibility rules "reasonably serve as a measure of competition in a given market and predictor of competitive constraints on future LEC behavior."[32] This is so because the rules make pricing flexibility available only where facilities-based competitors have collocated either in a large number of wire centers or in wire centers accounting for a very substantial portion of the ILEC's special access revenue in an MSA.[33] Such extensive facilities-based competition effectively disciplines not only the ILEC's pricing, but also its service quality.

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buildings (a 33 percent increase), and its revenues for the first nine months of 2001 were $915.6 million, almost double the $470.8 million it took in for the first nine months of 2000).

[32] *WorldCom v. FCC*, 238 F.3d at 459.

[33] *See* 47 C.F.R. §§ 69.709(c), 69.711. For Phase II relief, for example, a facilities-based competitor must be collocated either in 50 percent of wire centers or wire centers accounting for 65 percent of non-channel termination special access revenues (for transport services) or in 65 percent of wire centers or wire centers accounting for 85 percent of channel termination revenues (for channel terminations).

Moreover, this holds true throughout the ILEC's service territory, not just in MSAs where pricing flexibility has been granted.[34]

The CLECs do not dispute that 80 percent of ILEC special access revenue qualifies for Phase I pricing flexibility and nearly two-thirds qualifies for Phase II relief.[35] Nor do they (or could they) contend that such relief could not be granted in the absence of significant facilities-based competition. Rather, they disavow the relevance of the *Pricing Flexibility Order,* arguing that the Commission "expressly refused to deem incumbent LECs non-dominant in the provision of special access services."[36] They also assert that the lack of special access competition is demonstrated by the fact that ILECs have raised rates after receiving pricing flexibility. The first argument is overstated and irrelevant, and the second is misleading.

Contrary to the CLECs' implication, the *Pricing Flexibility Order* did not find that ILECs remain dominant in the special access market. The Commission concluded only that "the record in this proceeding is insufficient for us to conduct" a dominance/non-dominance analysis.[37] More fundamentally, the CLECs err in suggesting that performance measure and enforcement plans are necessary unless and until the ILECs are found non-dominant in the special access market. The pricing flexibility showing compels a conclusion that "competition for a particular

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[34] *See* Verizon at 7-8 (explaining that customers procure special access services under terms and conditions that apply to their entire networks; that Verizon's provisioning of special access services is centralized, so that service orders are handled in the same manner regardless of whether they pertain to an MSA that has received pricing flexibility; and that these facts are particularly true given the sheer number of MSAs where Verizon already has received or soon expects to receive pricing relief).

[35] *See* Verizon at 5.

[36] WorldCom at 33; *see* also Sprint at 5.

[37] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers' Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA,* 14 FCC Rcd 14221, 14247-48 (1999) ("*Pricing Flexibility Order*"). *WorldCom v. FCC,* 238 F.3d at 460 ("the FCC did not engage in a thorough competition analysis").

service within the MSA is sufficient to preclude the incumbent from exploiting any individual market power over a sustained period."[38] There is no rational basis for concluding, as the CLECs do, that competition that is sufficient to constrain pricing is not likewise sufficient to compel ILECs to offer reasonable and nondiscriminatory service.

Perhaps recognizing this problem, certain commenters suggest that, contrary to the Commission's conclusion, the ILECs' pricing behavior proves that the thresholds for pricing flexibility do not show the existence of effective competition.[39] Setting aside the fact that this argument amounts to a grossly untimely petition for reconsideration of a finding that has been explicitly affirmed on judicial review, the full record on pricing confirms that there is intense special access competition.

Following the grant of Phase II relief, Verizon has begun to re-align its rates more closely to reflect market rates.[40] While that has included some upward price adjustments where rates have been artificially depressed, there will be some downward adjustments to rates, and it will also include new discount offerings that take advantage of contract tariff opportunities.[41] Accordingly, a conclusion that competition is ineffective based solely on the initial tariff filing is both misleading and wrong.

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[38] *Pricing Flexibility Order,* 14 FCC Rcd at 14235. Although this statement was made in the context of Phase II relief, it is broadly applicable to the special access market given the substantial majority of MSAs that qualify for this level of relief and the region-wide nature of special access provisioning.

[39] *See, e.g.*, Comments of Ad Hoc Telecommunications Users Committee, CC Docket 01-321 at ("Ad Hoc"), 3-6 and App. I; AT&T at 12-14.

[40] The Commission contemplated that Phase II relief might result in higher rates. *See Pricing Flexibility Order*, 14 FCC Rcd at 14301-02 (acknowledging that the Commission's "rules may have required incumbent LECs to price access services below cost in certain areas.").

[41] AT&T at 14 complains that it must give Verizon a long-term commitment in order to secure lower rates. As AT&T is well aware, it is standard practice both in the special access market and in the telecom industry as a whole to offer attractive discounts in exchange for term commitments. Far from being anticompetitive such commitments enable the vendor to predict demand more accurately and to spread up-front cost over a long time period, removing uncertainty and lowering costs.

In sum, the fact that Verizon already has received widespread pricing flexibility is highly relevant to the issues in this proceeding. Pricing flexibility cannot be granted unless there is substantial facilities-based competition; the grants to Verizon and other ILECs confirm that there is substantial facilities-based competition; and that competition disciplines both rates and services quality, not just in the MSAs where pricing flexibility has been granted, but throughout the ILEC's service area.

C. The Receipt of Section 271 Authority Does not Increase a BOC's Incentive To Discriminate In Providing Special Access Services.

Several IXCs assert that the receipt of Section 271 authority increases the BOCs' incentive to discriminate in the provision of special access services, threatening competition in the market to serve "enterprise" customers (multi-location, large business).[42] To hear WorldCom tell it, "[f]ailure by the incumbent LECs to provision DS-1 channel terminations on a nondiscriminatory basis, to a limited number of well-chosen locations could have negative consequences for competition in the entire nationwide enterprise market."[43] This is absurd.

First of all, the IXCs' premise – that ILECs often are the only "last mile" route to enterprise customers[44] - is untenable. These large businesses are precisely the type of customer to whom CLECs and IXCs have been building facilities for the past 20 years. Even if a particular location does not have alternative facilities in place, an IXC almost certainly would find it worthwhile to deploy its own facilities, particularly if doing so would enable it to retain or win the overall telecommunications business of a regional, national, or multi-national customer.

[42] WorldCom at 6-9; AT&T at 16; Sprint at 3; Comments of Competitive Telecommunications Association, CC Docket 01-321, at 3, (filed January 22, 2002) ("Comptel").

[43] WorldCom at 9.

[44] *See* WorldCom at 7 (claiming that "the majority" of enterprise customer locations are served only by ILEC facilities).

Second, as WorldCom concedes,[45] the BOCs have almost no presence in the enterprise market. AT&T, WorldCom, and Sprint dominate this market, and each of those carriers has its own nationwide (and international) network, back office systems and product development capabilities geared to serving these sophisticated and demanding customers, and years of experience doing so. The BOCs face huge hurdles in establishing a credible presence in this market, not least of which is the fact that they are regional players. Indeed, the BOCs are at least as dependent on the IXCs (for nationwide and international capacity) as the IXCs are on the BOCs. Under these circumstances, it is ridiculous to claim that a BOC could sabotage competition in the enterprise market through strategic malevolence aimed at a few well-chosen channel terminations in its region. There is no prospect of attaining a competitive advantage through such conduct.

Third, even if there were some reason to believe that this type of anticompetitive behavior might succeed, the near-certainty and drastic consequences of getting caught would stop any such plan in its tracks. A BOC could not engage in sufficient discrimination to gain a competitive advantage in the enterprise market without competitors and regulators catching on. The conduct would have to be apparent to end users but not to competitors, which is extremely unlikely. Likewise, any deterioration in performance would be evident in the special access performance reports that Verizon and other BOCs already supply to the IXCs. The penalty for such behavior, moreover, would be potentially debilitating – including but not necessarily limited to substantial forfeitures.

Finally, BOCs have had Section 271 approval in several states for some time – for example, Verizon has had interLATA authority in New York for more than two years and SBC

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[45] WorldCom at 7.

has had such authority in Texas for roughly 18 months. Nonetheless, the IXCs can do no more than warn that the receipt of Section 271 authority "could have," or "is highly likely" to have,[46] a detrimental impact on the enterprise market – they have produced nothing to show that their speculation has any basis in reality. It does not.

D. **There Is No Basis for Allegations that Verizon Has Engaged in Unreasonable or Unreasonably Discriminatory Provisioning of Special Access Service.**

In our opening comments, we explained that Verizon has gone to extraordinary lengths to provide the most responsive, highest quality services possible. For example, we detailed Verizon's implementation of comprehensive voluntary reports, establishment of internal procedures to assure open and regular communications with customers and enhance the service ordering and provisioning process, and continuing investment in expanded special access facilities – measures that are undertaken in order better to serve our customers and respond to competitive pressures, not because of any legal imperative.[47]

Notwithstanding these commitments, a few commenters allege that Verizon's performance has been objectionable for one reason or another. They are wrong. Cable & Wireless references a complaint it had filed against Verizon,[48] but that complaint now has been dismissed because the parties are working out their differences.[49] The claims by Focal, VoiceStream, and Cablevision Lightpath are flatly incorrect.[50] Those carriers, for example,

[46] WorldCom at 8-9.

[47] Verizon at 9-10.

[48] Cable & Wireless at 5-8.

[49] *See Cable & Wireless USA, Inc. v. Verizon Delaware, Inc., et al.*, Order, DA 02-288 (rel. Feb. 7, 2001). In any event, Verizon has refuted Cable & Wireless's claims in it responsive pleadings in that proceeding.

[50] *See* Focal at 10-11; Comments of VoiceStream Communications Corporation, CC Docket 01-321, at 7-11 (filed January 22, 2002) ("VoiceStream"); Comments of Cablevision Lightpath Inc., CC Docket 01-321, at 2-4 (filed January 22, 2002) ("Cablevision Lightpath").

attribute poor performance to Verizon based largely on excluding customer not ready ("CNR") situations from on-time performance statistics. In a CNR situation, it is the customer, not Verizon, that causes the due date to be missed. Verizon is ready to install services but is prevented from doing so by causes outside its control. Those situations should count as on-time performance, and on that basis, Verizon's performance for all three of these carriers has been reasonable.

* * *

Competition in the special access market is sufficiently robust to obviate any need for the type of regulatory intervention being considered in this proceeding. That reality should be the end of the Commission's inquiry. While the remainder of these reply comments refutes the other factual, policy, and legal arguments advanced in favor of ILEC-specific performance measures and penalties, the bottom line is that such measures are neither necessary nor proper.

III. THE PROPOSED JOINT COMPETITIVE INDUSTRY GROUP METRICS SHOULD NOT BE ADOPTED

As detailed in our opening comments, Verizon already voluntarily provides our carrier-customers with a wide variety of special access performance reports.[51] Superimposing any kind of mandatory regulatory reports therefore is unnecessary and counter-productive; any one-size-fits-all reporting likely would be less responsive and informative than the reports Verizon already provides.[52]

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[51] Verizon at 9.

[52] Comments of Manhattan Telecommunications Corporation dba Metropolitan Telecommunications aka MetTel, CC Docket 01-321, at 4, (filed January 22, 2002) ("MetTel"). MetTel points out any broadly crafted nationwide metrics would be problematic, since ILEC systems and processes and market characteristics vary from location to location.

The Joint Commenters nonetheless proposes a set of metrics that are supposedly "concise," "coherent, practical, and enforceable."[53] They are nothing of the sort: they are burdensome, duplicative, misleading, and crafted to maximize the potential for penalty payments.[54]

The burdensome nature of the metrics stems in large part from their extreme disaggregation. Under the Joint Commenters' proposal, Verizon would have to report on over 300,000 measures every month,[55] in addition to the volumes of reports that Verizon already supplies to the Commission, various state commissions, and its customers. Such disaggregation is not remotely necessary to assure that reports are meaningful. Rather, the intent behind the disaggregation is clear: to multiply the number of metrics and sub-metrics as much as possible in order to increase the burden and expand the CLECs' opportunity to receive damages from the ILECs.

Aside from the irrational level of disaggregation, the measures themselves are duplicative, further increasing the burden on ILECs. For example, the proposed FOC Receipt measure (JIP-SA-1) and the FOC Receipt Past Due measure (JIP-SA-2) are mirror images of each other. The same holds true for the On Time Performance to FOC Due Date (JIP-SA-4) and Days Late (JIP-SA-5) measures. Once again, such duplication can be explained only by the

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[53] Joint Commenters Letter at 1.

[54] As explained in section V, below, the Commission lacks authority to require payment of liquidated damages for failure to meet performance metrics. The CLECs nonetheless argue to the contrary, and their metrics are predicated on the opportunity to transform penalty payments from the ILECs into a lucrative business opportunity.

[55] The Joint Commenters' measures would require each ILEC to report 10,140 measures each month, per carrier. This is estimated based on the Joint Commenters' proposal for 25 measurements (20 provisioning and 5 maintenance), disaggregated into up to 6 bandwidths (DSO to OC48), separated by ILEC/ILEC affiliates aggregate and CLEC/IXC aggregate (2), for each state in which Verizon operates (39) and separate reports by carrier (extremely conservative estimate of 30 per state). This equates to the following calculation ((39 x 2 x 6 x 20) + (39 x 2 x 2 x 5) = 10,140 per carrier x 30 carriers per state = 304,200).

CLECs' desire to maximize penalty payments from the ILECs, since a miss on one of these measures inevitably would produce a miss on the other.[56]

The measures are further stacked against the ILECs because they do not make allowances for performance problems resulting from causes outside an ILEC's control. In the last year, for example, Verizon has had to deal with the residual effects of a major strike and the aftermath of the September 11th tragedy, each of which impaired Verizon's performance through no fault of its own. Likewise, the Joint Commenters' proposal includes metrics that do not consider as on-time performance situations where the ILEC is ready to install service but the carrier's end user customer is unavailable or otherwise not ready (known as "customer not ready" or "CNR" situations). Under such circumstances, the ILEC must be permitted to count its performance as on-time, since, as noted above, it stands ready to perform but it is prevented from doing so by circumstances outside its control. The Joint Commenters' measures, however, would turn CNR situations into yet another opportunity for CLECs to receive penalty payments, since they would decrease the number of "successful" installations by excluding CNRs from on-time performance. In fact, structuring the metrics as proposed by the Joint Commenters would give CLECs an incentive to increase the number of CNRs in order to force the ILEC to miss the relevant performance metrics. The Commission cannot sanction such a result.[57]

Another serious shortcoming in the Joint Commenters' metrics is that they do not take into account the different product mixes and ordering processes used by carrier-customers and

[56] At a more fundamental level, the CLECs fail to recognize that there is no legal obligation to provide FOCs within any specific period of time. Verizon attempts to do so within five to seven days as an accommodation to its carrier-customers, even where it cannot verify that facilities exist. In contrast, as explained in the text, Verizon does not provide a FOC to its end user customers; indeed, it provides a due date only when it is certain that facilities are available (which can be weeks, depending on facilities construction).

[57] Each month, CNRs can account for up to 30 percent of all attempted installations. Excluding CNRs ignores the fact that Verizon had to work through the dispatch process, which affects its ability to provision other orders where the customers is ready, understating the amount of work Verizon must do.